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# **Coloniality and Indigenous Territorial Rights in the Peruvian Amazon: A Critique of the Prior Consultation Law**

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# Coloniality and Indigenous Territorial Rights in the Peruvian Amazon: A Critique of the Prior Consultation Law

Roger Merion Acuna

## Abstract

A massive indigenous protest in the Peruvian Amazon and its aftermaths triggered a social consensus in Peru about the necessity of intercultural policies and the enactment of a Consultation Law, a norm based on the ILO Convention 169 to consult indigenous peoples before approving any norm that can affect indigenous collective rights. Nonetheless, the paper argues that, like previous legal reforms related to the recognition of indigenous rights, the Consultation Law remains conceiving indigenous peoples as minorities with proprietary entitlements instead of conceiving them as nations with territorial rights. The Law is a form of liberal legality still embedded in coloniality. Consequently, indigenous peoples maintain a tense and ambiguous relation with liberal legality: they use the Consultation Law for territorial defence, but at the same time they criticise the limitations of this legislation to fully take into account indigenous cosmologies.

**Keywords:** Indigenous rights, Consultation Law, self-determination

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## 1 Introduction

In June 2009 the town of *Bagua* in the Peruvian Amazon was the scene of one of the most relevant political events in recent Peruvian history. Amazonian indigenous people blocked the *Curva del Diablo* highway for two months protesting against a governmental package of decrees approved by President García, which favoured the exploitation of natural resources in the Amazon. As a result of police repression, hundreds of people were wounded and thirty-three people died.

After this political event known as the *Baguazo*, a social consensus about the necessity to launch new intercultural policies emerged in Peru, directed not only to 'include' indigenous peoples but to recognise and value their different culture and, in this way, to reduce social conflicts (Sevillano, 2010). A Consultation Law was the legal mechanism that supposedly would achieve these aims. This is a norm based on the ILO Convention 169 that establishes the obligation to consult indigenous peoples before approving any administrative or legal norm that can affect their collective rights. This Consultation Law (Law N° 29785, September 2011) is the first of this kind in Latin America. It was welcomed by politicians, international organisations, civil society organisations and the business sector. This was the beginning of a new wave of legal indigenism given the attention and importance of the Consultation Law and indigenous legal and institutional devices recently approved.

In this article, I identify three waves of legal indigenism in Peru. The first wave was inaugurated by the legal recognition of 'indigenous communities' in the Constitution of 1920 and further superficial and conservative reforms under President Leguia (Grijalva, 2010; Wise, 1983; Varese, 1978). Leguia's discourse ('to incorporate the Indian to national society') was racist because the Indian had to be educated and civilised in the process of incorporation (Urrutia, 1992).

The second wave of legal indigenism was inaugurated by President Velasco (1968 – 1975), who enacted the Agrarian Reform Law and created the 'peasant community' in the Andes (1969) and the Law 20653 that created the 'native community' in the Amazon (1974). Peasant and native communities' land were strongly protected, but the aim of the recognition was not to repair indigenous from historical plunder and oppression but to integrate them into Peruvian society in order to widen the government popular support (Surrallés, 2009). Furthermore, the Native Law was a mean to assure internal colonisation because after titling communities, huge extension of land remained without 'owners' (land that truly constituted indigenous territory), favouring land

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taking by foreign people. For this reason, the process of titling was called 'institutionalised dispossession' (Barclay and Santos Granero, 1980: 43-74; Chirif, 1980: 15-24; Espinosa, 2010: 245).

The third wave of legal indigenism represented by the Consultation Law is still embedded in 'coloniality' as the previous legal reforms. Coloniality denotes that, even though colonial rule ended in formal legal and political terms, power remains distributed according to a colonial ontology and epistemology. With colonisation a new model of power is deployed, what Anibal Quijano calls the "Coloniality of power" (2000): race constituted the basis on which the European ontology and epistemology was constructed, what justified ethnic classification, consequently the economic division of the world and the legal and political justifications for the extension of the new order. This explains how social, legal and economic relationships regarding indigenous peoples still respond to an inclusion/exclusion paradox: indigenous peoples are either excluded from liberal capitalism or included into it under conditions that deny their territorial rights.

The inclusion/exclusion paradox is explained in the colonial denial of two key aspects of indigenous legality and politics: the denial of their territories and communal tenure and the denial of their character of nations (so they were conceived as ethnic minorities within a dominant nation). The new colonialism operates in a range of open exclusion in material and legal forms to a subtle inclusion in legal and political terms. The paradox remains in the current attempts to eliminate the indigenous communal tenure by recognising private property on specific plots as well as in the application of the state of exception within the context of massive protests, or the exploitation of indigenous territories on behalf of the 'national interest'.

Thus, the juridical innovations about the relations between the state and indigenous peoples have always responded to Western standards and the denial of indigenous rights. For the dominant liberal theory, indigenous peoples must be integrated, included, assimilated or accommodated within the liberal framework as ethnic minorities with proprietary entitlements, so they can 'participate' in the benefits of 'development', instead of seeing indigenous peoples as nations with territorial rights that pursue their own models of development. For this reason, indigenous peoples maintain a tense and ambiguous relation with liberal legality: they use private property, human rights and consultation law for territorial defence, but at the same time they criticise the limitations of this legislation to completely express indigenous cosmologies. Thus, indigenous peoples struggle for self-determination and social emancipation by appropriating and 'going beyond' liberal legality, and in this way they dispute the state logic of either inclusion or exclusion.

This article contributes to this discussion through an engagement with the implementation of the Consultation Law in Peru in relation to three areas: i) process and content of consultation with focus on the critiques on the Prior Consultation Law and the process of its implementation; ii) what is excluded or assumed in relation to territoriality (the meaning of territoriality as a foundational right for Amazonian indigenous peoples vis-à-vis the right to consultation); and in relation to self-determination (the article critically analyses the tensions between the right to self-determination of indigenous peoples and the 'national interest').

## 2 Indigenous Peoples and Coloniality

The processes of policy-making for the recognition of indigenous rights in Peru assume a theoretical framework of indigenous peoples' integration within the economic and political logic of the liberal state, neglecting fundamental questions such as territoriality and self-determination. It is important then to observe these processes from a different theoretical perspective and to understand the meaning of those aspects of indigenous politics and legality that liberal theory neglects. A decolonial approach is crucial for this task.

Decolonial theory is an original type of critical theory that examines how the power relations that constructed the indigenous as inferior race and created a global pattern of accumulation during colonisation, remain in force in the current global era. It took form through intellectual exchanges between Latin American scholars located in the North and in the South, whose reflections on global injustices, dependency and cultural studies showed a theoretical originality in relation to Wallerstein's world system theory and post-colonial studies. Although the movement is not uniform, and many scholars have engaged (and currently engage) with decolonial ideas with different emphasis, its main concepts are fundamental for studying the processes of colonisation and resistance.

The first premise of the decolonial approach is that colonisation in the 15<sup>th</sup> century constituted the basis of the epistemology and ontology of modernity rather than the secularisation and the consolidation of the bourgeois revolution in the following centuries (Dussel, 1994; Quijano, 2000). With colonisation a new model of power was deployed, what Anibal Quijano calls the 'coloniality of power' (2000): race constituted the basis on which the European ontology and epistemology was constructed, what justified ethnic classification, consequently the economic division of the world and the legal and political justifications for the extension of the new order.

Coloniality of power exerted two global processes: a global process of accumulation and a global process of naming. European powers exerted a global process of accumulation through the control of colonised labour and products, which allowed the richness of the North at the expense of the South (Stuart Hall, 1992/2013). The global process of naming meant the control of the labelling process to determine race superiority and inferiority (Quijano, 2000). Thus, the new identities allocated (Indians, blacks, mestizos) were represented as inferiors to European identity. This view shares Fanon's (1983) observation of how the indigenous is labelled not only as unable to have ethics but as a negation of ethics, which supported the hegemonic position of European culture, legality and economy.

Thus, coloniality explains the inclusion/exclusion paradox. After independence from Spanish, Portuguese and British empires, the new political units in Latin America obtained statehood in formal aspects, while the substantial aspect of the self-determination had to entail the construction of a 'nation' in which the indigenous nations had to be either included or excluded. The inclusion meant that they had to be adapted to the Western nation while the exclusion meant that they had to be eliminated in material or/and legal terms. Thus, in countries like Bolivia, Ecuador and Peru, the new power elites applied policies of violent assimilation until the last mid-century (Galindo, 2010). During this period, the forced conversion to Christianity, compulsory use of Spanish, or even outright genocide were usual practices (Sanders, 1989). The new republics were constructed as European, catholic and white countries with no place for autonomous indigenous peoples (Arocena, 2008).

The works of Rivera Cusicanqui in Bolivia (2010) or Stefano Varese in Peru (2006), amongst other scholars, show how the post-colonial liberal state maintains colonial patterns vis-à-vis indigenous peoples. In the contemporary world, coloniality continues to structure the politics, economics, social relationships and subjectivities through the naturalisation of liberal devices such as private property. At present, intellectual and political elites reproduce old ideas of indigenous backwardness and lawlessness by asserting that communal management of the land is an inefficient waste of economic assets and common resources would be better administrated by private regimes. To be sure, a theory of property that naturalises the liberal framework cannot understand indigenous communal organisation. Economic and political theory obscure the fact that Europeans imposed systems of property on the colonies, and that indigenous peoples were already there, living with their own tenure systems (Tully, 1994). In fact, indigenous peoples



vindicate the concept of territory as a geo-political space that includes a communal system of land and resources tenure rather than property, which involve a set of individual and collective rights and obligations. The legal notion of property usually is a means to achieve territorial protection.

Therefore, it is important to be very cautious when scholars such as De Soto (2010) proclaim that the only way to obtain development is by transforming the communal tenure system into private property. As territorial rights are embedded in indigenous identities, what these scholars are really proposing is that the only way for indigenous peoples to participate in the economy is to deny their indigeneity (Hvalkof, 2008). Indeed, these proposals are embedded in the logic of coloniality by denying the existence of a different indigenous legality and politics.

### **3 Inclusion/Exclusion in Peru and the International Arena**

The legal recognition of indigenous peoples in the last century meant that mechanisms of inclusion were less violent and more symbolic. In Peru the diverse types of indigenisms during 1920-1930 promoted indigenous rights with different emphasis but a similar rationale; on the one hand, a conservative indigenism of bourgeoisie intellectuals promoted a racism hidden by paternalism and capitalist modernisation; on the other hand, Marxist indigenism espoused a particular theory about the destiny of indigenous communities: their transformation into socialist cooperatives of production.

The official indigenism of the developmentalist government of Leguía (1908– 1912 and 1919– 1930) was a midterm between these two perspectives and for first time recognised legally the ‘indigenous communities’ in the Constitution of 1920. This recognition, however, was pushed by radical demands of rural indigenous uprisings. After 1923, indigenist governmental action was restricted to manipulative campaigns of pro-indigenous rhetoric, establishing, for example, the 24<sup>th</sup> of June as the day of the Indian (Wise, 1983). Indeed, pro-indigenous legislation and institutions were not effective in practice.

Later on, the political Left proposed a one-dimensional view of indigenous peoples by conceiving them as ‘rural proletarians’ to be included in the national workers movement, and not as indigenous nations. This period (1931-1942) also included a process of Hispanic reaffirmation, in which the Peruvian philosopher Alejandro Deustua asserted that Peru’s backwardness was due the indigenous race (Degregori and Sandoval, 2007).

The government of President Velasco inaugurated the second wave of legal indigenism. Velasco fostered legislation (Agrarian Reform Law; Law 20653) and administrative agencies directed to protect and modernise indigenous communities: their traditional internal organisation was changed to a cooperative model (Del Castillo, 1992; Matos et al, 1976), in which the word 'Indian' or 'Indigenous' was replaced for the word 'peasant' or '*campesino*'. This process of socialisation and modernisation of the Indian denied indigenous ontologies and in this way it affected the organisation of indigenous peoples around their ethnic character and their political aspirations. The peasants and their land were understood as an economic unit within the project of national integration and economic modernisation.

In spite of the inconsistencies of the legal system, the legal protection established the inalienability of indigenous lands and was beneficial for its defence. However, some years later a post-agrarian reform process of dismantling the legal protection of communities emerged. In 1978 Law 22175 replaced the provisions of Law 20653 and rescinded the ownership over forests and subsurface resources for native communities. Moreover, Article 28 subjects native communities to the greater 'social interest', which justified the exploitation and dispossession of indigenous land. In addition, the 1979 Constitution established two exceptions of inalienability: law founded in community interests claimed by a majority of 2/3 of active members, or in cases of expropriation for 'public need' (Del Castillo, 2004). These legal devices that subjected territorial rights to exceptional situations in which the state could dispossess indigenous peoples were reproduced by the General Law of Peasant Communities of 1987.

The legal protection for indigenous peoples was further weakened during Fujimori's government. Although affirming the multiethnic character of the country, the 1993 Constitution removed the still in force norms in favour of indigenous people contained in the 1974 legislation including the inalienability of indigenous lands, and reasserted the state's absolute control of natural resources. In addition, Fujimori enacted the Decree N° 653 ("*Ley de Tierras*"- *Law of Lands*) which introduced the agrarian land property, promoting the selling, leasing and mortgage of land, and also credit and forms of entrepreneurship (Del Castillo, 1992, 1997, 2004). In fact, the 'liberal multiculturalism' of Latin American constitutions and legislation of the nineties has integrated some international standards related to indigenous peoples' rights. However, the liberal devices applied cannot overcome the permanence of coloniality in economic, political and social relations.

This happens even with the right of indigenous peoples to free, prior and informed consultation before the approbation of any norm that can affect their collective rights. This right has been first recognised by the ILO Convention 169 (1989). It is usually regarded as one of the most salient achievement of liberal multiculturalism. The Declaration on the Rights of Indigenous Peoples of 2007 (DRIP) went further by recognising in general the necessity of *consent* of indigenous peoples before affecting their collective rights. The right of consultation has also been developed by the Inter-American Commission and Court on Human Rights (Page, 2004). However, consultation regulation and application is very contentious.

A critical analysis shows that the decisions of the Inter-American Court have been less protective than the DRIP regulation, which is not binding legal instrument (Pasqualucci, 2009). In the most important decision on the right of consent (*Saramaka vs. Suriname*<sup>1</sup>), the Court asserted that consent is necessary in cases of “large-scale development or investment projects that would have a major impact” on “a large part of their territory”, whereas the DRIP establishes in general that it is necessary to have a “free and informed consent prior to the approval of any project affecting their lands or territories and other resources” (Pasqualucci, 2009: p. 90). Namely, the DRIP establishes the requirement of consent regarding the possible impact on indigenous territory in general, and the Court requires the consent only if a major extension of the territory would be affected. This ambiguity allows certain interpretations according to which extractive activities that won’t affect the whole territory but an important part of it would not require the consent of indigenous peoples but only their consultation. The last decision of the Court on the issue (*Sarayaku vs. Ecuador*, 2012) does not go further in the recognition of the right of consent.

Another problem is that the globalisation of indigenous rights and specifically the right of consultation have been co-opted by public global institutions such as the World Bank, the Inter-American Development Bank (IADB), amongst others, and important private organisations such as the International Council on Mining and Metals (ICMM). All recognise the right of consultation but not the right of indigenous peoples to provide consent. For instance, according to the

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<sup>1</sup> In the 1990’s, Suriname granted logging and mining concessions to private companies within the traditional Saramaka people’s territory without their consent. In 2000, the petitioners complained to the Inter-American Commission of Human Rights and argued that, despite the fact that they were not in possession of a title for the territory, they had the right to use and possess the territory for their cultural, religious and economic activities. The case went to the Inter-American Court of Human Rights in 2006. The Court decided that Saramaka people did not need a title in order to own the lands and asked Suriname government to “delimit, demarcate and grant a collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations”.

Operational Policy 4.10 of the World Bank, in the projects that could cause impact on indigenous peoples, the borrower have to develop a process of *consultation* with indigenous communities, but it is not a requirement to gain their *consent* (MacKay, 2002). For Rodriguez-Garavito (2011) this appropriation of consultation by governance entities committed to the discourse of economic development shows how it is easily embedded in the global political economy. Consultation becomes thus a business device to achieve the status of companies that follow corporate social responsibility codes.

Therefore, consultation loses its emancipatory potential by remaining embedded in coloniality of power: liberal legality and its connection to the political economy of extraction reinforce domination on indigenous peoples. Transnational corporations promise important revenues to governments in exchange of massive exploitation of natural resources; international agencies and consultants see extractive projects as crucial anti-poverty measures, and international financial institutions continue to promote extractive projects while recognising the rights of indigenous peoples only related to social and economic participation in the project (Satterthwaite and Hurwitz, 2005). Indeed, the economic policies are implicitly based on the premise that indigenous peoples do not have the capacity to manage properly their own territory according to the 'national interest'. In sum, the extractivist economic policies and legality embody the prejudices of colonial governments which saw indigenous as primitive who should be civilised and eventually incorporated into Western culture (Davis and Wali, 1994).

#### 4 Critiques of the Prior Consultation Law

The Consultation Law is the outcome of the *Baguazo* and other protests against national policies that ignore the voices of the people affected by extractive industries. The Law was conceived as a legal mechanism to recognise indigenous cultures and, in this way, reduce social conflict (Sevillano, 2010). In fact, the right to consultation implies that any state legislation or administrative norm that could affect indigenous peoples must be consulted prior to its approval.

The approval of this piece of legislation was delayed during the last year of President Garcia's government. Ollanta Humala became president in 2011 with the 'social inclusion' banner, and the Consultation Law was one of his first measures passed by the Congress (it was symbolically promulgated in Bagua by President Humala). Nonetheless, the original enthusiasm about the Prior Consultation Law was quickly abandoned because its process of implementation through a bylaw was strongly criticised for establishing very polemical rules.

The Law had already polemical solutions: first of all, it did not recognise comprehensively ‘the right of consent’ (as in the UN Declaration), and it did establish a restrictive definition of the category of ‘indigenous’ (more limited than the Convention 169). With these premises, the Bylaw of the Prior Consultation Law deepened the problems. Its main criticisms are manifold. In what follows, I highlight the main areas of contestation.

First, there is a continuous emphasis of the necessity of ‘direct affectation’ of indigenous collective rights as a requirement to undertake consultation, what can be used to limit indigenous peoples’ rights by asserting that the affectation of those rights is merely ‘indirect’. The Declaration does not mention the necessity of ‘direct affectation’ and the Convention does not have that emphasis. Second, there are very polemical cases of exoneration of consultation processes, such as the construction and maintenance of infrastructure to provide health, education and in general ‘public services’ (15 Final Disposition of the Regulation). This norm is very dangerous because it can exonerate from consultation any development project that usually produces major impacts on the indigenous population. Third, there is not a proper regulation of the right to consent. The regulation only recognises two cases in which the consent of the indigenous peoples is necessary: when the state seeks to displace them to other territories (according to Convention 169), and when dangerous materials are attempted to be kept in indigenous land (according to the Declaration). The necessity of consent in projects that would produce ‘major impacts on large part of the territory’ established by the Inter- American Court of Human Rights in the Case Saramaka is not included. Fourth, the Second Final Disposition established that all legal and administrative measures previously enacted without a consultation process, maintain their validity. For many activists, the measures approved after 1995 (year in which Convention 169 entered into force), should be reviewed and consulted.

These critiques are common among NGOs – the latter have produced the bulk of the intellectual arguments regarding the Consultation Law and not academics. However, their analysis is limited to a description of what has been established by the Convention 169 and the Inter-American Court of Human Rights, without observing the roots of indigenous rights and their relation to coloniality. In fact, International Law is constantly re-constructed by struggles for rights’ recognition, so it is more important to analyse critically the social trends, the discourses and the emancipatory potentials of human rights than describing what the current state of affairs is.

For example, a high functionary of Afrodita mine in Northern Amazon argues that Afrodita obtained mining concessions in 1993, before Convention 169 was ratified by the Peruvian state; therefore, consultation was not a requirement for mining activities in this very sensible ecological area<sup>2</sup>. Although legal activists (Ruiz, 2012) have promoted audacious legal interpretations to address this issue, from a legalistic view, indeed, there would not be a right of consultation in this case. From a broader perspective on the implications of International Law and Human Rights, the right to self-determination cannot be ignored and recognised merely with a legislative act. It is an inherent right of a people.

Thus, to focus on consultation as a key element of indigenous legality and its political agenda would be misleading. Even more, a deep analysis of Consultation Law and its regulation would lead us to question its very rationality. Let us start by observing the structure of the consultation process. It is a process of 'dialogue' between the state and the peoples (with no intervention of companies); it is led by the public entity that enacted a Law or administrative norm (including licenses for extractive activities) that would affect indigenous collective rights. Then, the process may have 6 stages (arts. 14 – 23 of the Regulation): identification (of the people affected and the norm enacted); publicity (of the norm); information (the state inform indigenous peoples about the measure); internal evaluation (the community will evaluate the convenience of the measure); intercultural dialogue (which emerges only if there is no agreement after the internal evaluation); and decision (in case of disagreement the final decision is made by the state). This process has a very short duration: 120 days.

As can be observed, the whole process is designed as a mechanism to inform and convince indigenous peoples of a decision already made by the state; the 'intercultural dialogue' only appears if indigenous peoples are not persuaded. But should it not be the other way around? An intercultural dialogue should be the first stage in a state really respectful of indigenous peoples, in order to identify the priorities of indigenous populations regarding their needs and aspirations and undertake a mutually enriching dialogue.

The paper contends that this rationale for the Law is rooted in the colonial character of Western legality and the capitalist economy. Capitalist expansion needs the elimination of any barrier to investment, and social conflict is a barrier. The hope of some private actors and technocrats was to institutionalise the conflicts within the Consultation Law, and through this process - of passing

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<sup>2</sup> Company representative interview, 21-05-13.

information and persuasion – legitimise the policy: “If properly obtained previous consent should allow large extractive industry projects to go forward in a less conflicted atmosphere” (Laplante and Spears, 2008: p. 71). In sum, the law and its regulation is aimed at freezing indigenous politics into new extractivist policies.

In addition to this, the expectations and propaganda raised by the Consultation Law make us forget other important rights that have been historically part of indigenous peoples’ agenda, such as territoriality. As the activist Diego Garcia<sup>3</sup> asserts, nobody is thinking of consultation as an act of self-determination or even as a proper indigenous right, but as a means of not addressing serious issues.

## 5 Prior To Prior Consultation: Territoriality vs. Coloniality

Academics and activists tend to conceptualise indigenous rights around the right of consultation (see Salmón, 2013), so other rights are simply treated as emerging rights that someday would be recognised by the Law. This view is however incorrect because crucial rights such as territoriality and consent are not emerging claims; they have a long history of affirmation and resistance.

In fact, territorial rights and prior consent are connected to the right to self-determination, the original indigenous right based on the fact that indigenous peoples have lived in autonomy before colonisation. The indigenous legality (each one with their particularities) recognised territorial rights for indigenous nations, collective and individual land use rights, and a whole system of rights and duties that were attempted to be destroyed or obscured by Western legality. In the process, different peoples have maintained different degrees of autonomy, from peoples in voluntary isolation to peoples in process of complete assimilation to the Western logic. However, those peoples that have maintained their legal framework and their idiosyncrasy as ‘peoples’ still struggle for the maintenance of their foundational rights.

Therefore, self-determination is a principle and right for indigenous peoples, but is not only a cultural, fundamental or human right (all of them elaborated in Western terms as constitutional rights) but a *foundational right* in the sense that it is the basis of a whole legal, political and economic system rooted in non-Western ontologies and epistemologies. That is why I conceive this right as the ‘right to have communal rights’ beyond Western thinking (Merino, 2013). Self-

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<sup>3</sup> Author’s interview, 12-06-13

determination and territoriality as foundational rights support the right of consent, the right to use and obtain direct benefits from the land among others rights that contrast with new indigenous rights recognised in the last decades by international standards.

Indeed, many of these new rights respond to Western logic: the right of consultation (arts. 6 .1; 6.2; 15.2 of Convention 169), for example, has as premise that a state is going to affect indigenous self-determination and it needs at least to ask indigenous peoples their opinion; the right of indigenous peoples to participate in economic benefits obtained by extractive industries (art. 15.2 of Convention 169) respond to the fact that companies are exploiting (or are going to exploit) indigenous land and resources.

This does not mean that there is no certain recognition of foundational rights at international level (indeed, the Convention 169 timidly recognises the right to territory and the Declaration the right of self-determination); or that many indigenous peoples, because of their historical process, are closer to the discourse and practice of the new rights (such as consultation and economic benefits). It does mean rather that the problem of coloniality is still alive and hidden behind an optimistic discourse of indigenous rights' globalisation.

This situation generates practical consequences. After the regulation of Consultation Law, the Peruvian government had to decide which would be the first process of consultation. The communities of the Quichua of Pastaza were elected as the first communities to be consulted because they had suffered during decades from environmental impacts and had received considerable media attention. The consultation was planned to the commencement of exploitation activities of the oil concession 1AB located close to the communities. The Quichua of Pastaza, however, argued that before any process of consultation they wanted the recognition of their territorial rights and the remediation of 60 years of environmental impacts on their territory. The government had to, firstly, delay the process of consultation, and then renounce to implement the process. This example shows how new rights such as 'consultation' are confronted with foundational rights, such as territoriality.

The problem of focusing on consultation is that it can obscure foundational rights that are components of today's indigenous agenda. The most important indigenous organisation in Peru (the Interethnic Association for the Development of the Peruvian Amazon – AIDESEP) and one of the most important NGO that supports indigenous rights (the Institute of the Common Good -



*Instituto del Bien Comun*), for example, are promoting the notion of 'integral territory'. One of the experts of the Institute is an Awajun who has developed technically and theoretically this concept. According to him<sup>4</sup>, the problem is that native communities titling covers small parcels in which they live (as in the Andes) without taking into account the whole territory that includes spaces for fishing, hunting and collection. Then, huge areas become 'free spaces' that are given for extractive activities without the necessity of consultation. To face this problem, communities claim the extension of their titled land or they try to create new communities, but both of them are very bureaucratic processes. This problem can be overcome by titling peoples territorial habitats instead of specific plots.

National and international legal standards do not completely protect indigenous 'territories', but somehow they allow the elaboration of legal arguments in favour of the protection. For example, the Law of native communities (article 10), establishes that areas used sporadically for hunting, fishing, collection can be marked and titled; Article 13 of Convention 169 establishes that the term 'land' refers also to indigenous territories, and the Inter-American Court of Human Rights has established that is an obligation of the state the titling of 'collective property' (*Awas Tingni vs. Nicaragua*<sup>5</sup>).

Nevertheless, territorial rights and 'collective property' remains contentious and ambiguous concepts at the international level. The key concept of territory has specific features that make it different from property. However, whereas liberal legality tries to assimilate the concept into its logic; Amazonian indigenous peoples are demarking their territory in a long term strategy until its comprehensive legal recognition.

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<sup>4</sup> Indigenous interview, 04-04-2013.

<sup>5</sup> The Mayagna Awas Tingni Community lodged a petition before the Inter-American Commission on Human Rights denouncing the State of Nicaragua for failing to demarcate the Awas Tingni communal land regarding the imminent concession of 62,000 hectares of tropical forest to be commercially developed by a company within their ancestral lands. The Inter-American Court of Human Rights concluded that Nicaragua had violated the right to judicial protection and to property. The Court argued that the right to property acknowledged by the American Convention of Human Rights protected the indigenous people's property rights originated in indigenous tradition and, therefore, the State had no right to grant concessions to third parties in their land. Consequently, the Court decided that the State had to adopt the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law.

## 6 Beyond The 'National Interest': Indigenous Self-Determination and Social Emancipation

To consider 'consultation' as a mechanism of guaranteeing the exercise of the right of self-determination of indigenous peoples (Sevillano, 2010) is mistaken. As the International Andean Coordination of Indigenous Organisations - CAOI explains, without recognising the right to consent, consultation can be reduced to a simple procedure directed to legitimize the imposition of norms, programs and projects that negatively impact on indigenous peoples' rights (CAOI, 2012). Thus, one consequence of the right and principle of self-determination is the right to consent, wrongly called 'right to veto' because it does not derive from a special power conferred to indigenous peoples due to their hegemonic position in the democratic system (as is the case in presidential veto power), but it is expression of their self-determination as peoples. The problem is that no state wants to recognise self-determination for indigenous peoples because of the alleged possibility of secession.

But in reality what most indigenous peoples claim with self-determination is the respect of their vital spaces instead of the creation of new states. The anthropologist Richard Smith (2003) has accompanied indigenous movements for decades and has found that self-determination refers the right of a people to choose the type of relation it wants to maintain with a dominant state. There are of course some exceptions such as the radical proposals of the American Indian and scholar Ward Churchill (2002), who claim for the constitution of an Indian nation independent from the United States. However, most academic and political proposals range from some degree of autonomy through decentralisation within a dominant nation such as the liberal multiculturalism in Latin America, to political projects that recognise Indian nations within the state, such as a Federal state in Tully's proposal (1995)<sup>6</sup> or the Plurinational state of Bolivia.<sup>7</sup>

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<sup>6</sup> For James Tully (1995) indigenous peoples' struggles are special examples of the politics of cultural recognition, the 'strange multiplicity' of Other voices that demand a space, in their own cultural and political terms, in the constitution of modern political associations. Therefore, the dominant constitutional system that emphasises the unity of nation-states should be supplemented by a project of just recognition through multinational federations. Tully (1995) finds that the Western Common Law system can serve as a model for a federal system that include indigenous nations, since previously to colonisation indigenous populations were formed by political units that negotiated among them the access and entitlement to resources.

<sup>7</sup> The new Bolivian Constitution of 2009 goes beyond the previous one by recognising the plurality of Bolivian society and by providing a plurinational character to legislative, judicial and electoral government branches. Thus, Bolivia has moved from a multicultural state that recognises social and political rights for indigenous peoples to participate within the Unitarian liberal state, toward a plurinational state that stresses the character of nations of indigenous peoples (Galindo, 2010).

Independent nations	→	Radical Indian projects (Ward Churchill)
Plurinational State	→	Decolonial project (Bolivian constitution)
Federal States	→	Postcolonial/liberal project (James Tully)
Administrative autonomy	→	Multicultural project (Most constitutions in LA)

Then, to exert the right of self-determination does not mean secession, but an adequate relation between indigenous peoples and the state. In Peru, self-determination is legally recognised within the context of multiculturalism. Multiculturalism in Peru is equivalent to pluri-culturalism or the respect of the cultural plurality. Thus, Article 2.19 of the Constitution recognises the ‘ethnic and cultural plurality’ of the country and the right of each person to maintain their ethnic identity.

Article 89 and 149 of the Constitution recognises self-determination as the autonomy of peasant and native communities (which involves the right of autonomic organisation, communal work, use and free disposition of land, economic, administrative and jurisdictional autonomy within the ‘Law’). Nonetheless, as this autonomy does not mean that indigenous peoples hold a complete power of decision on their land (and they have not right on the resources of the subsoil), their claims often go toward decolonial projects. A decolonial project, as in the case of Bolivia, would mean the recognition of indigenous peoples not as ‘communities’ but as ‘nations’ and the recognition of their vital spaces not as ‘land rights’ but as ‘territorial rights’.

However, even in decolonial projects or any other project in which there is a dominant nation, the principle of self-determination is affected by norms of exception and national interest. The application of these norms has always been connected to the expansion of extractive industries. Indeed, as Orihuela asserts (2012), the rise of modern extractive industries is connected to indigenous exploitation and dispossession, in the mines of the Andes or the rubber plantations of the Amazon. It is therefore natural that in post-colonial nations, land rights are not well defined and the state owns all underground resources: this allows the legal displacement of communities in the name of the greater public good.

By exception the state can then exploit resources in protected areas created for its environmental fragility (Law 26834, Art. 21 b., 1997), and even in reserves for indigenous peoples in voluntary isolation (Law 28736, Art. 5 c., 2006) because the untouchable character of the reserves might be broken by the state on behalf of the public interest (Finer et al, 2008; Hughes, 2010). Therefore, by designing policies from the logic of coloniality, the government completely control peoples’

vital spaces and the reduction or violation of indigenous rights is a necessary sacrifice given the promise of development (Stetson, 2012). This power on indigenous peoples is usually justified as an expression of state sovereignty (the argument that indigenous peoples cannot have a 'veto power' over the state) or the necessity of economic development and the fulfilment of the government social responsibilities (Laplanche and Spears, 2008).

However, there is a historical connection between the political economy of extraction and the power to exploit indigenous territories on behalf of the national interest. This connection expresses the logic of coloniality by which certain peoples can be exceptionally sacrificed on the ground of the alleged economic benefits for all (economic argument) and the national cohesion (sovereignty argument). But what is obscured is that the people sacrificed usually have been ranked as the less civilised and constructed as those who urgently need to be integrated into modernisation. It is also obscured that these people are often those who have suffered most of environmental disasters and have never enjoyed real state public services. As they usually say, 'the state only reaches us when it wants to exploit our territory'.

Indeed, these arguments are very problematic because they are rooted in the colonial denial of indigenous foundational rights: all the consequences of this 'national cohesion' when territorial rights are at stake, entail the exclusion of indigeneity. Mega extractive projects often transform the social environment and construct new subjectivities (from indigenous to peasants; from peasants to miners or poor merchants), affecting the material foundations and consequently the cosmological world of indigenous peoples. The 'nation', therefore, is constructed on the basis of a constant state of exception on indigenous peoples and the inclusion/exclusion paradox.

Indigenous peoples properly recognised as nations with territorial rights would not be subjected to the 'national interest'. This political and legal recognition would be the result of political contestations towards a real social emancipation from coloniality. This aim, however, is far from being achieved if state and non-state actors are not able to uncover the way in which liberal devices such as consultation law still are embedded in coloniality, and if they are not able to revalorise the importance of indigenous foundational rights such as self-determination and territoriality.

## 7 Conclusion

In this article I have explained one crucial consequence of the colonisation process that has implications today: the double denial of indigenous peoples, the denial of their territories and communal tenure and the denial of their character of 'nations'. These denials meant that indigenous peoples were conceived, at best, as landowners (able to hold property rights) and citizens (able to hold political rights of participation) that belong to ethnic minorities instead of being conceived as a people with territorial rights that belong to a specific nation. The way in which this process has been undertaken ranges from an open exclusion - in material and legal forms -, to a subtle violent inclusion in legal and political terms.

The article also revealed the meaning of the inclusion/exclusion paradox: indigenous peoples are either included into the logic of the liberal capitalist state or excluded from it. Indigeneity is tolerated insofar it does not contradict the political and economic fundamentals of this system. Thus, participatory and economic rights of indigenous peoples are articulated in terms of the political economy of extraction: indigenous peoples are consulted about the way in which an unavoidable extractivism must be undertaken, and they have the right to obtain economic benefits from extractive activities.

Many indigenous peoples seek to transcend the inclusion/exclusion paradox by proposing a politics of self-determination. I suggest that indigenous self-determination can be understood from a decolonial perspective as 'the right to have communal rights'; it means a principle by which indigenous peoples have the right to enact their own legal, political and economic system. This principle does not deny the interrelation of indigenous peoples with the state and the market, but denies the undertaking of these interrelations in order to assimilate indigenous peoples.

In addition, self-determination is a specific collective right that I call 'foundational right'. I propose to differentiate between indigenous foundational rights (such as self-determination and territoriality) that support the whole indigenous system, and 'new indigenous rights', such as the right of consultation or the right to obtain economic benefits from extractive activities. Instead of foundational rights that are rooted in non-Western principles, the new indigenous rights are situated in the context of the global political economy of extraction and do not question the two denials of indigenous peoples mentioned above.

The paper has demonstrated that coloniality survives in the Prior Consultation Law by conceiving indigenous peoples as minorities with proprietary entitlements that can 'participate' in the benefits of 'development'; instead of seeing indigenous peoples as nations with territorial rights that pursue their own models of development. This explains why liberal legality cannot contain the whole indigenous cosmology and why indigenous peoples use this legality and move beyond it in a project of social emancipation that seeks to reinvent the state structure in order to properly recognise indigenous territorial rights and self-determination.

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